United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1253

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

FRED STEINBERG and DENNIS RIESE,

Defendants-Appellants.

ON APPEAL FROM A JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING IN BANC, ON BEHALF OF DEFENDANT-APPELLANT DENNIS RIESE

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Docket Nos. 76-1253 and
76-1258

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

PETITION FOR REHEARING

Defendant-Appellant Dennis Riese respectfully petitions the Court, pursuant to Rule 40, F.R.App.P., for rehearing of its decision herein filed March 7, 1977, affirming (2-1) his conviction on six counts of aiding and abetting the bribery of Immigration and Naturalization Service officers and one count of conspiracy to bribe such officers, and asserts the following:

1. The majority opinion herein was delivered by Circuit Judge Lumbard and was joined in by District Judge Bonsal, of the Southern District of New York, sitting by designation. Circuit Judge Van Graafeiland, the third member of the three-judge panel which heard this appeal, dissented in a thirteen-page opinion.

The Issue of Entrapment

2. In the opinion of the petitioner, the majority opinion overlooked or misapprehended [F.R.App.P., Rule 40(a)] the undisputed* evidence that appellant Riese was not predisposed, and in fact was extremely unwilling, to commit the crimes charged, until the time when his will was overcome by the conduct of the officers discussed below. Specifically, it is believed that the majority opinion overlooked or misapprehended

(a) the tape recorded statement by Mr. Riese at his first meeting with the agents that he wanted to get unauthorized alien employees "out of the stores," and that he did not "want to be breaking any laws" (269a);**

(b) the statement by Mr. Riese at the said meeting

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* The defendants did not take the stand or present any witnesses. They relied upon the evidence contained in conversations tape recorded by the government agents themselves, and on the testimony at trial given by the government witnesses.

** Page references followed by "a" refer to pages of Appellants' Appendix on this appeal.

in which he twice said that paying the agents a bribe would be "the worse thing" (319a), and said "I am not going to come through on that ... we have got an awful lot at stake ... I am really, I am very, very, very reluctant to do it" (320a);

(c) the statements by Mr. Riese at the same meeting that he "would not pay the money," and that "I can't say anybody is worth it to me" (321a);

(d) the statement by Mr. Riese at the same meeting that "I would like not to be a part of that, I mean, I just have too much at stake to be a party to that" (323a);

(e) the statement by Mr. Riese at the same meeting that "it is not worth it for me to pay it or even get involved ..." (322a);

(f) and other similar passages referred to in appellants' briefs on this appeal and in the dissenting opinion of Judge Van Graafeiland (see slip opinion, pp. 2204-2214).

3. Although many of the passages in the record containing the evidence above referred to are quoted in full in the dissenting opinion of Judge Van Graafeiland, they are not quoted in the majority opinion. The majority opinion acknowledges, however, certain of Riese's expressions of unwillingness, and acknowledges that throughout his first meeting with the agents, "Riese continued to express reluctance about the

payment of money bribes ..." (slip opinion, p. 2195). The majority opinion also acknowledges the testimony by certain aliens who were government witnesses at the trial that "Riese had expressed reluctance and disapproval of the venture" (slip opinion, p. 2197, n. 2). The majority opinion attempts to explain these passages as follows (slip opinion, p. 2199):

> "Although Riese said on several occasions that he did not want to be a party to any cash bribes, this does not necessarily mean that he had a determination not to become involved in anything illegal; he may simply have been worried at the thought of money bribes and the increased risk of being caught" (emphasis added).
>
> * * *
>
> "... Riese may have been attempting to protect himself by expressing reluctance, feigning ignorance ..." (emphasis added).

It is respectfully urged

(a) that a "determination not to become involved in anything illegal" need not be shown by a defendant who raises the defense of entrapment; rather, it is the burden of the prosecutor to show beyond a reasonable doubt that the defendant was "predisposed";

(b) that in any event the conclusion in the majority opinion concerning Mr. Riese's expressions of reluctance is negatived by the undisputed evidence that Mr. Riese said, "I don't want to be breaking any laws" (emphasis added; see slip opinion, p. 2205);

(c) that the majority opinion engages in impermissible speculation, rather than weighing of evidence, when it relies upon surmise as to what Mr. Riese "may" have meant when he made his unequivocal statements of unwillingness to pay a bribe;

(d) that the majority's speculation that Mr. Riese may have been worried about being caught, even if correct, hardly supports an inference of predisposition; rather, as the dissent points out (slip opinion, p. 2213), "lack of predisposition is not dependent upon the motive which brings it into being."

4. The majority opinion relies on evidence that Mr. Riese, in his first meeting with the agents, offered them free dinners and tickets to sporting events. It is believed that the majority opinion overlooked or misapprehended the clear evidence that at the time of this statement, the agents had been conducting a "series of raids" against the restaurant chain involved since "early in 1975" (dissent, slip opinion, p. 2202), that they had been conducting a "'blitz' campaign" (dissent, slip opinion, p. 2203), and that the meeting opened with a statement by one of the agents that he and his partner were there to "talk" about the "blitzing," and to "[s]ee if we can slow that down somehow ..." (dissent, slip opinion, p. 2204). As in Sherman v. United States, 356 U.S. 369 (1958), the acts which are relied on to show predisposition were in fact no more than a "product of the inducement" (p. 374).

5. It is urged that the majority opinion overlooks or misapprehends the significance of Sherman v. United States, supra, 356 U.S. 369 (1958), which petitioner believes is indistinguishable from this case on the issue of entrapment. There, as here, the only evidence was the undisputed testimony of the prosecution's witnesses (p. 373). There, as here, there was undisputed evidence of petitioner's "hesitancy" to commit the crime (p. 375), and there was undisputed evidence that the petitioner "tried to avoid the issue" and acquiesced only "after a number of repetitions of the request" (p. 371). There, the Court held that entrapment was shown, that the prosecution had failed to show predisposition, and that the argument that the petitioner showed a "ready complaisance" to commit the crime would not avail in the face of the clear evidence of reluctance (p. 375).

6. The majority opinion herein states that "it would be going beyond the appropriate limits of judicial review for three appellate judges to second-guess the unanimous verdict of twelve jurors" (slip opinion, p. 2200). It is respectfully urged that the majority opinion overlooks or misapprehends the holding in Sherman v. United States, supra, 356 U.S. 369 (1958), on the question of the right of an appellate court to find that evidence of predisposition was lacking. In Sherman, as here, a jury had convicted the defendant, having decided the issue of entrapment adversely to him. The Supreme Court, on evidence

we contend is indistinguishable from that here, concluded that "entrapment was established," and did so on "the undisputed testimony of the prosecution's witnesses" (p. 373). Petitioner contends that there was no evidence here from which a jury could properly have concluded that he was predisposed, that the Court had every right so to rule from all the evidence in the case, and that speculation as to what he "may" have been thinking is improper in the face of the undisputed evidence of his repeated, clear and unambiguous statements of reluctance to commit the crimes charged.

7. Petitioner respectfully urges that if clear statements of reluctance to commit a crime, tape recorded secretly by the government itself, such as those here, do not establish entrapment and lack of predisposition, then the effect of the majority opinion in this case may be to eliminate the defense of entrapment from the criminal law of this Circuit.

The Issue of Governmental Misconduct

8. Petitioner also contends that the majority opinion has overlooked or misapprehended the undisputed evidence showing that the government's agents in this case engaged in highly improper conduct. Petitioner contends that the holding of the majority opinion that the conduct here was "certainly not improper" (slip opinion, p. 220?), overlooks or misapprehends the significance of two recent decisions by other panels of this Court, and may be in conflict with those decisions.

See United States v. Archer, 486 F.2d 670 (2d Cir. 1973), and United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), both cited in the dissenting opinion of Judge Van Graafeiland (slip opinion, p. 2212). Specifically, petitioner believes that the majority opinion has overlooked or misapprehended the following undisputed evidence showing that the agents induced the commission of crimes by blunt threats to destroy appellant's business and by false representations that the agents' acts were legal:

(a) the tape recorded statement of the agents that they would "cripple" the business (287a);

(b) the tape recorded statement of the agents that "the chain itself" would be jeopardized unless the bribe were paid (321a);

(c) the tape recorded threat of the agents that the restaurants would "get botched up and kicked around all the time" if the bribe were not paid (321a);

(d) the tape recorded reminder by the agents that "... we knocked you out of operation quite a few times" (322a);

(e) the repeated tape recorded reminders by the agents concerning the "damage we do when we come in ..." (326a; see 327a);

(f) the tape recorded reminders by the agents concerning a restaurant they had "closed down" and the reminder that in that particular raid the store involved "lost the help" and that the raid cost "half your staff" (327a);

(g) the statement by one of the agents that "this can all be prevented" (327a);

(h) the trial testimony by one of the agents that he wanted to make it clear that he "had power" (37a);

(i) the repeated tape recorded statements by the agents to appellants that they were "not being crooked" (320a, 321a);*

(j) the trial testimony of one of the agents that he "wanted to make sure that these people knew that all of this was legal," and that he wanted appellants "to think that everything [he was] doing was legal" (36a).

9. Petitioner respectfully contends, on the basis of the undisputed evidence, that the agents made a highly improper threat, see Lynumn v. Illinois, 372 U.S. 528, 531 (1963), and that they made a highly improper misrepresentation of a kind calculated to overcome the will of the defendant, see Spano v. New York, 360 U.S. 315, 323 (1959) Petitioner respectfully contends that the undisputed evidence demonstrates "illegal

* The majority opinion states that the agents' assurances as to legality were made solely in connection with the processing of "green cards, which was legal ..." (slip opinion, p. 2200, n. 3). We believe it is clear, however, that the statements were made in particular connection with payments of money as well. The agents asserted that they were not being "crooked" by comparing themselves to "lawyers" who may charge "$2,000" for similar "results," and again asserted that they were not being "crooked" in specific connection with a proposed payment of "500 bucks" (321a).

methods" of investigation within the meaning of Spano v. New York, supra, 360 U.S. at 321; that it demonstrates conduct "beyond any proper prosecutorial role" and impermissible "governmental involvement in crime" within the meaning of United States v. Archer, supra, 486 F.2d 670, 672, 676 (2d Cir. 1973); that it demonstrates investigatorial "methods that lead to decreased respect for the law" within the meaning of United States v. Toscanino, supra, 500 F.2d 267, 274 (2d Cir. 1974); and that it demonstrates improper conduct by the government "in concert with the defendant" which is "sufficiently offensive" to bar prosecution as a matter of due process of law and under the supervisory power within the meaning of the concurring and dissenting opinions of five of the Justices of the Supreme Court in Hampton v. United States, 425 U.S. 484 (1976). It is believed that the majority opinion herein has overlooked or misapprehended the impact of these decisions on the facts in this case, even if there is no entrapment here.

SUGGESTION FOR REHEARING IN BANC

Petitioner respectfully suggests, pursuant to Rule 35, F.R.App.P., that a rehearing in banc is proper and warranted in this case.

1. Under Rule 35(a), F.R.App.P., a rehearing in banc may be ordered "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when

the proceeding involves a question of exceptional importance." Petitioner respectfully urges that the questions presented on this appeal are of exceptional importance, and that consideration by the full Court is necessary to secure uniformity of its decisions.

2. It is respectfully suggested that the questions presented herein are of exceptional importance because they deal with the proper scope of law enforcement activities and criminal investigaton, and the extent to which techniques of criminal investigation may intrude upon the lives of citizens. As Judge Van Graafeiland stated in his dissent (slip opinion, p. 2204),

> "This was not investigation, it was instigation; and it sullies the good name of every conscientious law enforcement officer in the country to characterize it as proper."

Judge Van Graafeiland also pointed to a letter written by appellant Riese to his supervisor explaining that the agents had demanded a bribe, that the demand would be refused, and that there would be "reprisals." Judge Van Graafeiland said (slip opinion, p. 2208),

> "I quote this language to point up the tragedy of a citizen of our great country having to worry about the anger of a law enforcement officer, arising out of the citizen's refusal to pay a demanded bribe."

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tions are of exceptional importance because they deal not only with the direction which the important defense of entrapment is to take in this Circuit, but also because they deal with the question whether and to what extent governmental misconduct may bar prosecution, even where there may be no entrapment.

4. Petitioner respectfully suggests that rehearing in banc is necessary to secure uniformity in the decisions of this Court, because the decision herein may be in conflict with the decisions in United States v. Archer, supra, 486 F.2d 670 (2d Cir. 1973), and United States v. Toscanino, supra, 500 F.2d 267 (2d Cir. 1974). The Archer case was decided by a panel of this Court consisting of Judges Friendly, Feinberg, and Mansfield. The Toscanino case was decided by a panel of this Court consisting of Judges Anderson, Mansfield, and Oakes. None of these Judges sat on the panel which decided the instant appeal. Had another panel been chosen, it is possible that this appeal would have been decided differently.

5. Rehearing in banc is also necessary, petitioner suggests, in order to ensure that the doctrines announced in this case represent the views of those Judges of this Court who are responsible for the development of the law in this Circuit. Under Rule 35, F.R.App.P., a suggestion for rehearing in banc is acted upon only by the circuit judges who are in "regular active service." And under 28 U.S.C. § 46(c), "[a] court in banc shall

consist of all circuit judges in regular active service." As the Supreme Court said in United States v. American and Foreign Steamship Corp., 363 U.S. 685, 689 (1960),

> "They [in banc courts] are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit."

The Court also quoted (p. 690) from the dissenting opinion of Judge Clark of this Court in the same case for the proposition that in banc courts are convened so that "'the active circuit judges shall determine the major doctrinal trends of the future for their court ....' 265 F.2d, at 155."*

6. As noted above, one of the Circuit Judges who sat on the original panel in this case dissented and voted to reverse the convictions. The only other Circuit Judge on the panel voted to affirm. He was joined by a District Judge sitting by designation, and thus his views became the majority opinion. With no disrespect intended either to Judge Lumbard

* In United States v. American and Foreign Steamship Corp., the Supreme Court held that a retired circuit judge could not sit as part of a court in banc, even though he had been on the original panel and even though he had been in active service at the time rehearing in banc had been ordered. Since that decision, the statute (28 U.S.C. § 46) has been amended to provide that a retired "circuit judge" is competent to sit on a court in banc if he sat on the panel which originally heard the case. In all other respects, the statute remains substantially the same.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK))

CAROLE P. BROCK, being duly sworn, deposes and says: that deponent is in the employ of Shea Gould Climenko & Casey, attorneys for defendant-appellant Dennis Riese herein, is over 18 years of age, is not a party to this action, and resides at 39-20 Greenpoint Avenue, LIC, NY 11104. On the 18th day of March, 1977, deponent served two copies of the within Petition for Rehearing, and Suggestion for Rehearing in banc, on Behalf of Defendant-Appellant Dennis Riese on/each of the following at the addresses designated by them for that purpose:

Joyce Krutick Barlow, Esq.
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Hon. Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
Attorney for the United States of
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U.S. Courthouse Annex
New York, New York 10007

by depositing true and correct copies of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Government at 330 Madison Avenue, New York, New York 10017.

Carole P. Brock

CAROLE P. BROCK

Sworn to before me this
18th day of March, 1977.

Elsie L. Selig

ELSIE L. SELIG
Notary Public, State of New York
No. 31-3589950
Qualified in New York County
Commission Expires March 30, 1977